

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGIL LEE SMITH,
Petitioner-Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
Tamal, California,

Respondent-Appellee.

No. 21133

APPELLEE'S BRIEF

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FILED

SEP 22 1966

WM. B. LUCK, CLERK

NOV 4 1966



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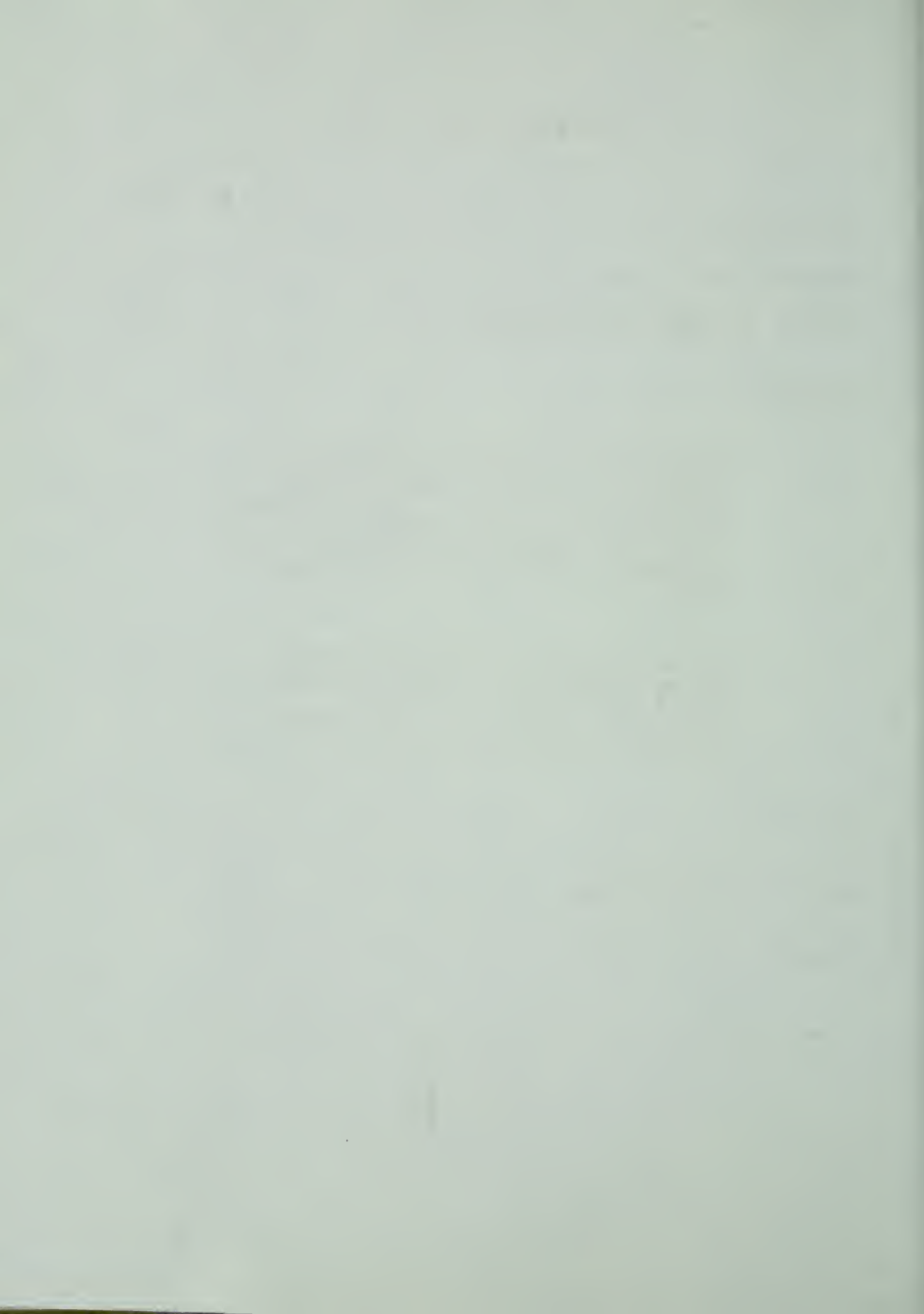


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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGIL LEE SMITH,
Petitioner-Appellant,
vs.
LAWRENCE E. WILSON, Warden,
California State Prison,
Tamal, California,
Respondent-Appellee.

No. 21133

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

This brief represents the initial appearance of the California Attorney General, on behalf of appellee

and respondent Lawrence E. Wilson, in this matter. Appellee filed no pleadings in the court below.

On February 24, 1953, appellant was convicted in the Superior Court for the City and County of San Francisco of violation of California Penal Code section 211 (second degree robbery) and was sentenced to the state prison for the term prescribed by law (one year to life, Pen. Code §§ 213, 671). This conviction followed appellant's plea of not guilty and trial by the court sitting without a jury during which he was represented by the public defender. A certified copy of this judgment and order of commitment is annexed hereto in the Appendix and is "EXHIBIT A."^{1/}

On October 21, 1957, appellant was convicted in the Superior Court for the County of San Joaquin of violation of California Penal Code section 211 and sentenced to the state prison for the term prescribed by law, the sentence to run consecutive to any other incompleated sentences. This conviction followed appellant's plea of guilty, at the time of entry of which he was represented

1. Exhibit A, together with the other exhibits in Appellee's Appendix serve to explain matters which relate to appellant's present claim for relief. The Court of Appeals may take notice of these records of proceedings in the state and federal courts which relate to appellant's claim for relief. See, Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962); St. Paul Fire and Marine Insurance Company v. Cunningham, 257 F.2d 731, 732 (9th Cir. 1958); United States ex rel. Pavloc v. Chairman of Board of Parole, 81 F.Supp. 592, 593 (W.D.Pa. 1948), aff'd on opinion below, 175 F.2d 780 (3rd Cir. 1949) (cited with approval in Stiltner v. Rhay, 322 F.2d 314, 316 n. 6 (9th Cir. 1963).

by the public defender. A certified copy of this judgment and order of commitment is annexed hereto in the Appendix and is "EXHIBIT B."^{2/}

On December 3, 1963, appellant was convicted in the Superior Court for the City and County of San Francisco of violation of California Penal Code section 211 and sentenced to the state prison for the term prescribed by law, the sentence to run concurrently with any prior incomplete sentences. This conviction followed appellant's plea of guilty at which time he appeared without counsel. A certified copy of this judgment and order of commitment is annexed hereto in the Appendix and is "EXHIBIT C."^{3/}

On July 23, 1964, appellant's application for habeas corpus, which attacked the validity of his 1963 conviction and present custody thereunder, was summarily denied by the Marin County Superior Court (CT 10).

On August 12, 1964, appellant's application for habeas corpus, which attacked the 1963 conviction, was denied by the United States District Court for the Northern District of California, Misc. No. 1038, because appellant had failed to exhaust his then available state remedies. A copy of the District Court's order in this matter is

2. See Footnote 1, supra.

3. See Footnote 1, supra.

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONERS OF THE
UNIVERSITY OF CHICAGO
FOR THE YEAR 1900-1901
PUBLISHED BY THE UNIVERSITY OF CHICAGO PRESS
CHICAGO, ILL., 1901

THE UNIVERSITY OF CHICAGO
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CHICAGO, ILL., 1901

annexed hereto in the Appendix and is "EXHIBIT D."^{4/}

On October 28, 1964, appellant's application for habeas corpus which also attacked his 1963 conviction, was denied by the California Supreme Court, Crim. No. 8188, (CT 10). A copy of this petition to the California Supreme Court is annexed hereto in the Appendix and is "EXHIBIT E."^{5/} This petition does not challenge the validity of the 1963 conviction on the grounds that appellant was denied the right to counsel at trial.

On December 29, 1964, appellant's petition for habeas corpus, attacking his 1963 conviction, was denied by the United States District Court for the Northern District of California, Misc. No. 1099 (CT 10).

On July 29, 1965, the United States District Court for the Northern District of California denied appellant's petition for habeas corpus which also attacked his 1963 conviction (CT 23). The petition attacked that conviction on the grounds that appellant was denied counsel during trial (CT 5-6). The District Court denied the petition because the grounds set forth therein were also set forth in the petition which was denied on December 29, 1964, by

4. See Footnote 1, supra.

5. See Footnote 1, supra. The Court of Appeals may take notice of this prior state court petition. Murry v. Louisiana, 347 F.2d 825 (5th Cir. 1965).

the same court. The District Court cited Title 28, United States Code section 2244 (CT 23).

Appellant's application to the District Court for a certificate of probable cause to appeal was denied on December 1, 1965. The District Court denied this application because appellant's record indicated that he had been convicted of second degree robbery in 1953 and again in 1957 and appellant failed to show that sentences on these prior convictions had expired. The District Court's ruling was expressly based on McNally v. Hill, 293 U.S. 131 (1934) (CT 30).

After rehearing, a certificate of probable cause to appeal, and leave to appeal in forma pauperis were granted by the District Court on May 17, 1966 (CT 43).

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant has failed to exhaust his presently available state remedies because his petition to the California Supreme Court, which attacked the 1963 conviction, failed to raise the contention that he was denied counsel at trial.

II. Appellant is in custody under each of his three convictions and would, therefore, not be entitled to immediate release even were a writ of habeas corpus to issue.

ARGUMENT

I

APPELLANT HAS FAILED TO EXHAUST HIS PRESENTLY AVAILABLE STATE REMEDIES BECAUSE HIS PETITION TO THE CALIFORNIA SUPREME COURT, WHICH ATTACKED THE 1963 CONVICTION, FAILED TO RAISE THE CONTENTION THAT HE WAS DENIED COUNSEL AT TRIAL.

After the United States District Court for the Northern District of California denied appellant's petition for habeas corpus on August 12, 1964, for failure to exhaust state remedies (EXHIBIT D), appellant petitioned the California Supreme Court for habeas corpus. A copy of this petition is annexed hereto and is "EXHIBIT E."^{6/}

This petition does not challenge appellant's 1963 conviction on the basis of denial of the right to counsel at trial. Moreover, in his present petition appellant stated that no appeal was taken from the 1963 conviction (CT 2), and did not indicate having made any petition for habeas corpus to the California Supreme Court other than the petition in Crim. No. 8188 discussed above.

This being so, denial by the District Court of his present petition was proper because appellant has failed to give the California state courts an opportunity

6. The Court of Appeals may notice this prior petition to a state court. See, Footnote 1, supra; Murray v. Louisiana, 347 F.2d 825, 827 (5th Cir. 1965).

to rule on his contention that he was denied counsel at trial.^{7/} 28 U.S.C. § 2254; Rose v. Dickson, 327 F.2d 27, (9th Cir. 1964).

II

APPELLANT IS IN CUSTODY UNDER EACH OF HIS THREE CONVICTIONS AND WOULD, THEREFORE, NOT BE ENTITLED TO IMMEDIATE RELEASE EVEN WERE A WRIT OF HABEAS CORPUS TO ISSUE.

Appellant's record shows that on three separate occasions he was convicted by the California courts of second degree robbery (EXHIBITS A, B, C). Because appellant has failed to show or claim that he has completed his imprisonment under his unchallenged convictions of 1953 and 1957, the District Court's denial of his petition for habeas corpus was proper.^{8/} King v. California, 356 F.2d 950 (9th Cir. 1966); Collins v. Klinger, 353 F.2d 731 (9th Cir. 1965). Appellant's record indicates that he is presently serving a life sentence under each of his three convictions. A copy of appellant's sentence data

7. The Court of Appeals may review appellant's compliance with Title 28, United States Code section 2254 even if the District Court did not consider the point because whether that section has been satisfied is a question of law and not one of fact. Rose v. Dickson, 327 F.2d 27, 28 (9th Cir. 1964).

8. The Court of Appeals may consider this point even though the District Court did not consider it as such when it denied appellant's petition. See Wells v. People of State of California, 352 F.2d 439 (9th Cir. 1965).

is affixed hereto in the Appendix and is "EXHIBIT F."^{9/}
Therefore, even were appellant to successfully attack his
1963 conviction and sentence and a writ of habeas corpus to
issue, he would not be entitled to immediate release because
he would remain in custody under his prior two convictions.

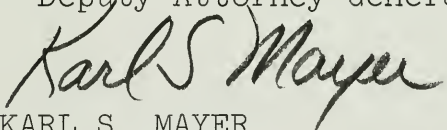
Under these circumstances, appellant is not
entitled to a writ of habeas corpus and the District Court's
denial of the writ was proper. McNally v. Hill, 293 U.S.
131 (1934).

CONCLUSION

For the foregoing reasons, it is respectfully
submitted that the order of the District Court denying
the petition for writ of habeas corpus should be affirmed.

DATED: September 21, 1966

THOMAS C. LYNCH, Attorney General
of the State of California
ROBERT R. GRANUCCI
Deputy Attorney General


KARL S. MAYER
Deputy Attorney General

Attorneys for Appellee.

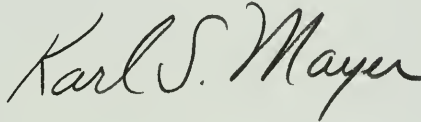
9. The Court of Appeals may notice this record of
actions of the California Adult Authority. See Footnote 1,
supra, especially United States ex rel. Pavloc v. Chairman
of Board of Parole, 81 F.Supp. 592, 593 (W.D.Pa. 1948),
aff'd on opinion below, 175 F.2d 780 (3rd Cir. 1949)
(cited with approval in Stiltner v. Rhay, 322 F.2d 314, 316
n. 6 (9th Cir. 1963)).

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

September 21, 1966

A handwritten signature in cursive script that reads "Karl S. Mayer". The signature is written in dark ink and is positioned above the printed name and title.

KARL S. MAYER
Deputy Attorney General
of the State of California

A P P E N D I X

FILED
JAN 24 1953
AT
A. J. HARRIS
RECEIVED BY
JAN 24 1953

A-23752



DEPT. NO. Twelve CASE NO. 48202

In the Superior Court of the State of California

IN AND FOR THE City and COUNTY OF San Francisco.

ABSTRACT OF JUDGMENT
(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs.

VIRGIL LEE SMITH,

Defendant.

Hon. H. A. van der Zee
(Judge of Superior Court)

Alton C. Lawless, Asst.
(District Attorney)

Joseph I. Monamara, Asst.
Public Defender

This certifies that on the 24th day of February, 1953 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 48202 Count No. he was convicted by Court; on his plea of not Guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of Felony, to wit: ROBBERY, SECOND (2nd) DEGREE;

(designations of crime and degree if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm);
in violation of SECTION 211 OF PENAL CODE;
(reference to Code or Statute, including Section and Sub-section);
with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION
WITHIN INSTRUMENT IS A PERFECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE			
L. E. WILSON, WARDEN CALIFORNIA STATE PRISON AT FOLSOM, CALIF.			
CLERK OF COURT			

Defendant was not charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

EXHIBIT A

Defendant adjudged a habitual criminal within the meaning of Sub-division of
(was) or (was not) (a) or (b)

Section 641 of the Penal Code; and the defendant a habitual criminal in accordance with Sub-division (c)
(is) or (is not) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the City and County of San Francisco and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows
(Note whether concurrent or consecutive as to each count):

and in respect to any prior incomplete sentence (s) as follows:
(Note whether concurrent or consecutive as to all incomplete sentences from other jurisdictions):

To the Sheriff of the City and County of San Francisco and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at SAN QUENTIN, CALIFORNIA at your earliest convenience.

Witness my hand and seal of said court

this 24th day of FEBRUARY, 1953

MARTIN MORGAN Clerk

by [Signature] Deputy

State of California,
City and County of San Francisco ss.

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 24th day of February, 1953

MARTIN MORGAN

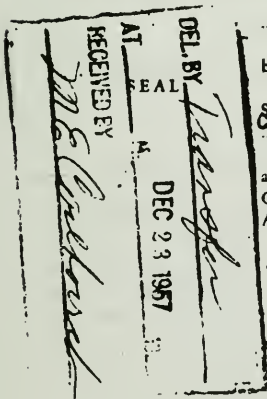
County Clerk and Ex-officio Clerk of the Superior Court of the State of California in and for the
City and County of San Francisco

The Honorable: [Signature] City and
Judge of the Superior Court of the State of California, in and for the County of
San Francisco

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

314.

ENTERED- FEBRUARY 24th, 1953, MINUTE BOOK, DEPT. NO. 12, VOL. 160, PAGE ~~114~~



INJUNCTION CENTER

DEPT. No. 1 CASE NO. 13485



In the Superior Court of the State of California

IN AND FOR THE COUNTY OF San Joaquin

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 12135)

The People of the State of California,

vs

VIRGIL SMITH, Defendant.

Hon. R. M. QUINN
(Judge of Superior Court)

William F. Roberts
Deputy (District Attorney)

Public Defender
(Counsel for Defendant)

Handwritten: K. H. Phillips
Handwritten: K. H. Phillips

This certifies that on the 21st day of October, 1957, judgment of conviction of the above-named defendant was entered as follows:

In Case No. 13485 Count No. he was convicted by Court on his plea of

"Guilty" (guilty, not guilty, former conviction or acquittal, once in jeopardy,

not guilty by reason of insanity); of the crime of Robbery of the Second Degree, a Felony

(designation of crime and degree, if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 261 of the Penal Code whether victim suffered bodily harm)

in violation of Section 211 of the Penal Code of the State of California

(reference to Code or Statute, including Section and Sub-section):

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION
THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE ATTEST: L. E. WILSON, WARDEN CALIFORNIA STATE PRISON AT SAN JOAQUIN BY <i>[Signature]</i> RECORDS OFFICER			

(AFFIX SEAL)

Defendant WAS NOT charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

EXHIBIT B

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

THE ANNEXED INSTRUMENT IS
A CORRECT COPY OF THE OR-
IGINAL ON FILE IN MY OFFICE.
ATTEST:
CERTIFIED

DEC 5 - 1963

MARTIN MORGAN, COUNTY CLERK OF SAN
FRANCISCO, AND EX-OFFICIO CLERK OF
THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, IN AND FOR THE CITY AND
COUNTY OF SAN FRANCISCO.

DEPUTY

RECEIVED
CALIF. MEDICAL
FACILITY

DEC 6 2 31 PM '63

GUIDANCE CENTER

DEPT. No. 12 CASE No. 62292

DEC 5 - 1963
MARTIN MORGAN, CLERK

BY J. FITZPATRICK
Deputy Clerk

In the Superior Court of the State of California

IN AND FOR THE City & COUNTY OF San Francisco

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

VS

VIRGIL LEE SMITH,

Defendant.

Hon. Harry J. Neubarth
(Judge of Superior Court)

William Auslen
Asst. (District Attorney)

Propria Persons
(Counsel for Defendant)

This certifies that on the 3rd day of December, 1963 judgment of conviction of the above-named defendant
was entered as follows:

In Case No. 62292 Count No. one he was convicted by court (Court or Jury)

Guilty

(guilty, not guilty, former conviction or acquittal, once in jeopardy,
not guilty by reason of insanity); of the crime of felony, to-wit: Robbery, second degree,

(designation of crime and degree, if any, including the fact that it constitutes a second or subsequent conviction of same offense
if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)
section 211 Penal Code,

in violation of (reference to Code or Statute, including Section and Sub-Section);

with prior convictions charged and proved or admitted as follows: ~~dismissed at time of plea.~~

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant was not ~~charged and admitted being~~ charged and admitted being, or was found to have been armed with a deadly weapon at the time
(was) or (was not)

of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections
969c and 3024.

THE WITHIN INSTRUMENT IS A
CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.

ATTEST:

L. E. WILCOX, IV, CLERK
CALIF. SUPERIOR COURT

BY: [Signature]
RECORDS OFFICER

GA-76 (34436)

(AFFIX SEAL)

EXHIBIT C

Defendant **was not** adjudged a habitual criminal within the meaning of Sub-division of
(was) or (was not) (a) or (b)

Section 644 of the Penal Code; and the defendant a habitual criminal in accordance with Sub-division (c)
of that Section (a) or (b) not)

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment
in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of
the **City & County of San Francisco** and by him delivered to the Director of Corrections of the State of
California at the place hereinafter designated

It is ordered that sentences shall be served in respect to one another as follows:
(Note whether concurrent or consecutive as in each count)

and in respect to any prior uncompleted sentence (s) as follows:
(NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions)

to run concurrently.

To the Sheriff of the **City & County of San Francisco** and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the
custody of the Director of Corrections at **Vacaville, California,**
at your earliest convenience

Witness my hand and seal of said court

this **3rd** day of **December, 1963**

Martin Mongan

Clerk

by

J. FITZPATRICK

Deputy

SEAL

City & County of San Francisco

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made
and entered on the minutes of the Superior Court in the above entitled action as provided by Penal
Code Section 1213.

arrest my hand and seal of the said Superior Court this **3rd** day of **December** 19**63**

Martin Mongan

City & County of San Francisco

The Honorable

Judge of the Superior Court of the State of California in and for the
San Francisco

City & County of

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach
a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

Entered Dec. 3, 1963, vol. 207-page 471.

Execution stayed until December 3, 1963.

DOCKET
ADM-SF
CIV-SW
CR-SF <i>W. H. 1</i>
Entered by <i>W. H. 1</i>
Date <i>AUG 31 1964</i>

FILED
AUG 28 1964

CLERK U.S. DIST. COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

VIRGIL LEE SMITH,
Petitioner,
vs.
STATE OF CALIFORNIA, et al.,
Respondents.

case 1038

~~ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS AND DISMISS-
ING PETITION FOR WRIT OF HABEAS CORPUS~~

W. H. 1
REC-1
Petitioner, a prisoner of the State of California at
the San Quentin Prison, seeks to file in forma pauperis a
petition for writ of habeas corpus.

The petition does not show that petitioner has exhausted
his remedies in the state courts. Such a showing is pre-
requisite to his petition to this court, 28 U.S.C. §2254.

It is ordered that leave to proceed in forma pauperis
be, and the same hereby is, denied and the petition for writ
of habeas corpus is dismissed.

Dated: August 28, 1964,

STANLEY A. WEIGEL
Judge

EXHIBIT D

CRIMINAL No. _____

RECEIVED
SEP 11 9 05 AM '64
U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE
SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION

OF

VIRGIL LEE SMITH,

FOR A WRIT OF HABEAS CORPUS,

(VS)

WALTER DUNBAR, DIRECTOR OF CORRECTIONS,
STATE OF CALIFORNIA; LAWRENCE E. WILSON,
WARDEN OF THE CALIFORNIA STATE PRISON AT
SAN QUENTIN, STATE OF CALIFORNIA.

DOCKET	
ADM-SF	_____
CIV-SF	_____
CR-SF	64-759
Entered by	mmv
Date	SEP 11 64

PETITION FOR WRIT OF HABEAS CORPUS

AND

POINTS AND AUTHORITIES.

VIRGIL LEE SMITH, PRO. PER.
POA # A-23952-B
TAMAL, CALIFORNIA

EXHIBIT E

INFORMED THAT

SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION

OF

VIRGIL LEE SMITH,

FOR A WRIT OF HABEAS CORPUS,

(VS)

WALTER DUNBAR, DIRECTOR OF CORRECTIONS
OF THE STATE OF CALIFORNIA; LAWRENCE E. WILSON,
WARDEN OF THE CALIFORNIA STATE PRISON AT
SAN QUENTIN, CALIFORNIA .

CRIM.# _____.

PETITION FOR

WRIT OF HABEAS

CORPUS.

TO: THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA;
THE PETITION OF VIRGIL LEE SMITH RESPECTFULLY SHOWS:

(ONE)

That petitioner is making this petition on behalf of Virgil Lee Smith
the applicant in the above captioned matter; that he is without funds
of any sort to pay the filing fee if any, ^{and cost/} and prays the Court
will allow him to proceed in forma pauperis at this time.

(TWO)

That said Virgil Lee Smith is imprisoned and restrained of his liberty
at the state penitentiary at San Quentin, Marin County, State of California
by Lawrence E. Wilson, Warden thereof, at the direction of Walter Dunbar
Director of California Department of Corrections.

(1)

(THREE)

THAT the imprisonment of said Virgil Lee Smith is illegal and said illegality thereof consists in this, to wit:

A

That on December 5, 1963, in Department # 12, Case # 62292, in the Superior Court of the State of California in and for the County of San Francisco, petitioner was committed to State Prison as provided by Penal Code section 1213.5 for violation of section 211 P.C., with all prior charges dismissed, wherein the Court ordered that such sentence shall be served in respect with one another as follows: and in respect to any prior incomplete sentence (s) as follows: to run concurrently. "by the order of Judge H.J. Neubarth."

B

That on February 10, 1964 petitioner was given a copy of certification of Adult Authority Action that took place at San Quentin Prison after a hearing on parole violation charges: (WNT) Pled Guilty. 12-6-63. Revoked, Denied, Place on December 1966 Calendar. Page 313 Vol. 41, Dated: February 19, 1964.

C

That petitioner was convicted September 22, 1957 in the Superior Court of the State of California, Stockton California for violation of section 211 P.C. and sentenced to serve a term in State prison as proscribed by law. On or about June 20, 1962 the Adult Authority heard the case and fixed petitioner's term at seven (7) years and at this date petitioner had been detained by the Adult Authority for a period of some four (4) years and seven (7) months.

D

The Adult Authority drew up a contract for the petitioner, to wit: That at a later date in 1962 petitioner could be released on parole

to serve the remaining two years and some months on said seven year term on parole and thereby complete his sentence of seven (7) years which was the lawful period for which the Adult Authority could detain the petitioner.

II

That on December 10, 1963 petitioner violated the contract of the parole and was given a hearing wherein the Adult Authority redetermined his prison term and denied petitioner any consideration for a period of three years which will cause the petitioner to serve three (3) years over and beyond the set and fixed term of seven (7) years.

CONTENTIONS

I

It is petitioner's contentions that the term of sentence in his case was lawfully seven (7) years as fixed by the determination of the Board and must be res judicata and cannot at a later date be raised under the law.

2

Petitioner submits that the Adult Authority has express power to determine and/or redetermine a prisoners term of sentence (3020 P.C.) but once the term has been fixed (determined) as in petitioner's case which was seven (7) years, to start 10/22/57, which is now in the year of 9/64 surely 10/22/1957 calculated with 10/22/64 equals seven (7) years, and "they (the board) may merely modify in any redetermination of such term and not augment.

(A) To assume the converse would be to afford the Adult Authority greater power than any Court in the land and petitioner seriously doubts this to be legislative intent.

(B) The case of In re Couch, 27 C.2d 637 supports petitioner's position viz. "the board by a subsequent declaration could not breath life into a total term of imprisonment which had come to an end."

(C) The rule is subject to limitations that in criminal matters and cases a sentence already partially served cannot be increased.

Whortons Cr.L.and Pr. 9th Ed. Section 913;

U.S. v Behz 282 U.S. 384, 386-387, 51 S.Ct.113, 75 L.Ed. 354;

Ex parte Lange 18 Wall 163, 51 L.Ed. 548.

(D) To increase petitioner's sentence after he had served part of the seven (7) year term subjected him to double punishment for the same offense which he had committed in 1957, and was sentenced to serve seven (7) years for the offense, and was sentenced to three more years by raising his term by three (3) years making him have to serve ten (10) years instead of seven (7) years. This is in violation of the Fifth Amendment to the Constitution, which provides that no person shall be subjected for the same offense to be twice put in jeopardy of life or limb.

By their fixing of petitioner's term in December 1962 to be for the period between 12/6/63 to 12/1966, the board has exercised its function a second time. A sentence may be reduced after it has been partially served but it may not be augmented. It is not a jurisdictional but a constitutional question. Harrison v Bracker, 78 LT. 433 at 435.

By the fixing of petitioner's term in (1962, 6/20/62 on or about) at seven (7) years the board has exercised its function under Penal Code section 3020 et.seq., and therefore Penal Code sec. 2940 should operate for petitioner to discharge his term, 12-6-64.

Petitioner avers that parole violation is not a crime, but is a disregard of official rules and regulations. Otherwise, parole violators would appear in court for judicial proceedings in legal orderly manner. As such, parole violations do not affect the original sentence nor can it interfere with his constructively being a prisoner of the Department of Corrections under sec.2940 P.C. whether on

parole of incarcerated.

The Adult Authority is an agency (board) deriving its powers from the Constitution of California, and is duly a constitutionally constituted board under administrative law.

Article 10, section 1, formerly 7, Cal. Const.

Petitioner asserts that by virtue of the foregoing article the Adult Authority is affected by administrative law and its actions become void in law.

See: Cal. Jur. 2d Administrative Law, sec. 26, 151-152.,

McC. Dig. Adm. Law. sec. 11, 120;

the same as deciding of a competent court are res judicata.

The Adult Authority has exceeded its jurisdiction in detaining petitioner beyond his lawful discharge date of 12/6/63 or 12/6/64. The records show net term to be finished 12/6/63, but there is no question that 10/6/57 equals seven (7) years. This violates petitioner's rights both statutory and constitutional.

WHEREFORE, it is urged that the writ of habeas corpus as prayed for in the petition be as used, directed to the said Walter Dunbar, Director of Corrections, State of California, and Laurence E. Wilson, Warden of the State Prison at San Quentin, commanding them to have the body of said Virgil Lee Smith before Your Honor at the time and place therein to be specified, to do and receive what shall then and there be considered by Your Honor, concerning said Virgil Lee Smith, together with the time and cause of his detention, and said writ, and that he, said Virgil Lee Smith may be restored to his liberty.

September 4 ?

Dated this 9 day of 4 1964.

Virgil Lee Smith
VIRGIL LEE SMITH, PRO. PER.

STATE OF CALIFORNIA }
COUNTY OF MARIN }

{33:

VERIFICATION OF PETITION FOR HABEAS CORPUS

I, VIRGIL LEE SMITH, UNDER PENALTY OF PERJURY DECLARE:

That I am the petitioner in the foregoing action;

That I have read the petition for habeas corpus and know the contents thereof; that the contents thereof are true of my own knowledge and beliefs except as to those matters therein alleged on information and belief and as to those matters I believe them to be true also.

Executed this Sep of 4 1964, and respectfully submitted,

Virgil Lee Smith
VIRGIL LEE SMITH, PETITIONER PRO. PER.
P.O. BOX A23952-B
EMERALD, CALIFORNIA

"The term of sentence, as fixed (determined) by the Adult Authority (board), must be considered to be res judicata and cannot at a later date be raised under the law.

Statewide administrative bodies consist of agencies that do, and those that do not, derive their powers from the Constitution. Res judicata applies to the former and the latter. The Adult Authority is an agency (board) deriving its power from the Constitution of California.

The legislature has the Constitutional power to determine what officers, agencies or boards shall exercise the powers now exercised by the Adult Authority and the scope of such powers, thereby making the Adult Authority be and a duly constitutionally constituted board under administrative law.

Article ten (10) section one (1) formerly seven (7), California Constitution, says: "The legislature may provide for the establishment, government, charge and superintendence of all institutions for all persons convicted of felonies."

For these purposes, the legislature may delegate the government, charge and superintendence of such institutions to any public ~~institution~~ government agency or agencies, officers, boards, whether now existing or hereafter created by it, any such agencies, officers or boards shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the legislature may prescribe."

Petitioner here asserts that by virtue of the foregoing Article ten (10) section one (1), the decisions determined by the Adult Authority, are affected by administrative law and become res judicata. See: Cal. Jur. 2d Administrative Law, section 26, 151-152.

Cal. Dig. Administrative Law, sec. 11, 110.
In the same way as decisions of a competent court
are res judicata.

Petitioner submits that the Adult Authority has express power to determine and/or redetermine a prisoner's sentence (3020 P.C.), but once the term has been fixed (determined) they (the board) may merely modify in any redetermination of such term, not augment. To assume the converse would be to afford the Adult Authority greater judiciary power than any court in the land and the petitioner seriously doubts that this was the intent of the legislature.

The case of In re Gowan 27 Cal 2d 637, supports petitioner's position. viz., "the board, by a subsequent declaration could not breath life into a total term of imprisonment which had come to an end."

Further, "the rule in subject to limitations that in criminal cases a sentence already partially served cannot be increased."

Wharton's Cr. L. Pr. 9th ed. section 913;

U.S. v. Penz 282 U.S. 304, 306-307, 51 S.Ct. 113, 75 L.Ed. 354;

Ex parte Lange 18 Wall 163, 21 L.Ed. 548.

"To increase the sentence after it had been served in part subjects the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall be subjected for the same offense to be twice put in jeopardy of life or limb." "A sentence may be reduced after it has been partially served but it may not be augmented. It is not a jurisdictional but a constitutional question."

Harmon v Bruckner, 78 Ct. 433, 435.

By their fixing of petitioner's term in 1962 to the amount of seven (7) years the board has exercised its function under Penal Code section 3020 et seq., and therefore Penal Code sec. 2940 should operate for petitioner to discharge his term 1964.

THE HISTORY OF THE CITY OF BOSTON

FROM 1630 TO 1830

BY SAMUEL JOHNSON, ESQ. OF NEW-YORK

NEW-YORK: PUBLISHED BY J. B. ALLEN, 1830

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THE HISTORY OF THE CITY OF BOSTON

Petitioner here submits the case--17 33 QJ13, (1945) 25 C.2d. 799, (194 P.2d. 897) at p. 804 the Court speaking through Mr. Justice Schauer (with all other justices concurring) said:

"The discussion by Judge Charles W. Fricke, acting pro tempore for the District Court of Appeal, in Poo v Payer, 1435, 9 Cal App 2d 157, 160, 49 P.2d. 208, correctly states the law. Subject to limitations necessarily implied by the provisions mentioned, as said in the case of In re Leland, 193 193 C.387 (214 P. 492); In re Leland, 177 C. 600 (171 P.953), and In re Leland, 106 C.A.43 (288 P.1109), that when a sentence is imposed under the indeterminate sentence law (Penal Code) the term of imprisonment is the maximum provided by law until action is taken by the Board of Prison Terms and Paroles (where the Adult Authority Dept. of Corrections is the successor to Board of Prison Terms and Paroles, see: In re Leland (1945) 25 C.2d 794 at p.797, 154 P.2d 873) which may and is required to fix the period between the maximum and minimum penalties and when so fixed the term of imprisonment is the period fixed by order of that board."

Petitioner avers that parole violation is not a crime, but is a disregard of official rules and regulations. Otherwise Parole Violators would appear in Court for judicial proceedings in legal orderly manner, as parole violation does not affect the original sentence nor can it interfere with his Constructively being a prisoner of the Department of Corrections under Penal Code section 2990, whether on parole or incarcerated.

The Adult Authority has exceeded its jurisdiction in detaining petitioner beyond his lawful discharge date which violates his rights, both Statutory and Constitutional.

WHEREFORE, it is urged that the writ of habeas corpus
as prayed for in the petition be issued, granted as law, justice and
order would require.

Respectfully submitted,

This 2 day of 4 1964.

Vigil Lee Smith
VIGIL LEE SMITH, PRO. PER.
P.O. BOX A-23952-B
SAN DIEGO, CALIFORNIA

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
JANUARY 1950
J. H. HARRIS

Received from the Department of Chemistry,
University of Chicago, Chicago, Illinois

SUMMARY OF SENTENCE DATA

	CREDITS FORFEITED	CREDITS RESTORED	ADDITIONAL CREDITS	DISCHARGE DATE	PAROLE EFFECTIVE DATE
CRIME: Robb. 2nd(211-PC)					
TERM: 1-Life					
COUNTY: San Francisco					
County Case No.: 48202					
JUDGE: H.A. van der Zee (CC)					
2-24-53 RLC S.Q.					
6-24-53 Trans. to Solidad					
8-10-54 AP to PC 1. 1 Cal Yr. Denied.					
SEP 8 1954 Trans to NCP S Miramonte					
FEB 14 1935 Rec'd from NCP S Miramonte (medical)					
AUG 8 1955 TRA 5 1/2 yrs. Granted					
last 2 yrs. on parole. <i>W</i>					
8-25-56 Trans. to M.P. - pro. rel.					
8-27-56 Paroled from Sol.					
8-27-56 Report direct to Sacto					
10-22-57 PV WNT REC'D REC CMF					
11-15-57 PAR SUS TRFA MAX					
DEC 23 1957 RECEIVED AT FOLSOM <i>W</i>					
FEB 18 1958 PG TO CTS <i>W</i> PNG TO CTS					
FG OF CTS FNG OF CTS					
CTS DISM PAR REV Denied					
PLACE ON 10/60 <i>W</i>					
4-29-58 Rec'd at SQ					
10-10-60 - Rec'd					
1-26-61 Assigned CC 13					
7-9-61 Ret. S.Q. (Board)					
7-10-61 TRFA - 5 YRS TRFA - 4 YRS					
95 wpt - Granted 2 yrs					
9 mos on Parole					
7-10-61 To CC 13					
9-7-61 Ret. S.Q. (Dental Inst Comm.)					
11-30-61 - NOTED					
6-20-62 Paroled San Francisco Dist. C.					
12-6-63 PV WNT REC'D RGC CMF					
12-18-63 Parole Canceled					
2-10-64 Rec'd SQ					
2-10-64 PG. Revoked. Denied.					
Place on 12-66 cal.					

EXHIBIT F

SUMMARY OF SENTENCE DATA

CRIME:	Credits Forfeited	Credits Restored	Additional Credits	Discharge Date	Parole Effective Date
Robb 2nd, CS WPT (211(213)PC					
SENTENCE: 1-Life, CS WPT					
COUNTY: San Joaquin					
County Case No. 13485					
JUDGE: R. M. Dunne (PG)					
10-22-57 PV WNT REC'D RGC, CMF					
DEC 23 1957 RECEIVED AT FOLSOM					
4-29-58 Rec at SQ					
10-10-60 - Released					
1-26-61 - Assigned CC 13					
7-9-61 - Ret. S.Q. (Board)					
7-10-61 - TFA - Type S. WPT -					
Granted 2 yrs Probation Parole					2-24-65 5-24-67
7-10-61 To CC 13					
9-7-61 Ret. S.Q. (Parole + Inst. Conv.)					
11-30-61 - NOTE 12					
6-20-62 - Parole San Francisco Dist. & C.					
12-6-63 PV WNT REC'D RGC CMF					
12-18-63 Parole Cancelled					LIFE
2-3-64 Rec'd SQ					

SUMMARY OF SENTENCE DATA

[illegible]

THE HISTORY OF THE

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